Supreme Court, U. S.
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No. 80-149

IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

MISCELLANEOUS DRIVERS AND HELPERS UNION, LOCAL 610, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

v.

THE PULITZER PUBLISHING COMPANY
and
NATIONAL LABOR RELATIONS BOARD,

Respondents.

BRIEF FOR RESPONDENT THE PULITZER PUBLISHING COMPANY IN OPPOSITION

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TABLE OF AUTHORITIES

Page

Radio and Television Broadcast Technicians Local Union 1264 v. Broadcast Service of Mobile, Inc., 380 U.S. 255 (1965) 3

South Prairie Construction Co. v. Local No. 627, 425 U.S. 800 (1976) 3

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The petition filed in this Court by the intervenor-union raises a fairly innocuous question concerning the application of the *Universal Camera* substantial evidence test in a distinctive factual setting. Petitioner does not seek alteration or abrogation of this long-ingrained standard of review but merely quarrels with the Eighth Circuit's application of it in the circumstances of this case. The issue thus presented is a very narrow one which is misleadingly depicted by the petition and which, in any event, is scarcely deserving of this Court's attention.[1]

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[1] It is noteworthy that the NLRB, whose decision was reversed by the Court of Appeals, has not pursued this case to this Court.

This case arose from the Board's attempt to require Pulitzer to bargain collectively with truck drivers working for a separate and totally independent entity, Berberich Delivery Company. Berberich delivered the St. Louis Post-Dispatch, published by Pulitzer, to various dealers and vendors pursuant to a contract with Pulitzer. The Board contended that Pulitzer and Berberich should be deemed "joint employers" of the drivers because of the appearance of a Pulitzer officer at one drivers' collective bargaining session and because of certain limited contact on the job-site between Pulitzer supervisors and Berberich drivers.

The record was undisputed that at the time of the allegedly improper refusal to bargain, there were no interlocking officers or directors between Pulitzer and Berberich and that there was no overlapping financial interest between the two companies. The drivers in question were hired, supervised, disciplined, and, where necessary, fired by Berberich. Berberich alone determined how many drivers to employ and scheduled their working hours, vacations and birthday holidays. Berberich alone issued their work rules, maintained time records and paid the drivers on its own payroll checks. All fringe benefits were likewise paid by Berberich, and all labor relations problems were required to be directed to and corrected by Berberich supervisory personnel. The contract between Pulitzer and Berberich for delivery of the Post-Dispatch required each company to supervise and pay its own employees and further stipulated that it should not be construed "to suggest that Berberich and the St. Louis Post-Dispatch are general partners, limited partners, joint venturers or joint employers, or otherwise stand in relation to one another other than as independent businesses."

The NLRB concluded that Pulitzer was a "joint employer" of the Berberich drivers because of a single appearance by a Pulitzer official at a collective bargaining session concerning the drivers' contract and because Pulitzer supervisors occasionally gave instructions to the drivers as to the route to take in delivering their newspapers. The Court of Appeals refused to enforce

that order and held that the Board had committed a mistake of law in focusing almost exclusively on the amount of control exercised by Pulitzer over Berberich labor relations. The Court ruled that the Board had erred as a matter of law by refusing to apply the four-part analysis to the joint employer issue that was approved by this Court in *Radio and Television Broadcast Technicians Local Union 1264* v. *Broadcast Service of Mobile, Inc.*, 380 U.S. 255 (1965). There the Court held that the Board may assert jurisdiction over separate entities "where they comprise an integrated enterprise" and stated that the controlling criteria for determining joint employment are "inter-relation of operations, common management, centralized control of labor relations and common ownership." *Id.* at 256. *Accord: South Prairie Construction Co.* v. *Local No. 627,* 425 U.S. 800, 802 (1976). Indeed, counsel for the Board had urged the Court of Appeals to reject the four-part test and to focus entirely on the "amount of control" exercised by Pulitzer over Berberich labor policies. The Court of Appeals rejected that invitation and refused to enforce the Board's determination that the control of labor relations reflected in this record justified the conclusion that Pulitzer was a joint employer of the drivers.

After discussing the applicable four-part test, the Eighth Circuit stated (Pet. App. A-32):

> "Applying this test to the relationship between Pulitzer and Berberich as of October 3, 1977, when the union requested bargaining, we find that substantial evidence on the record as a whole does not support the conclusion that the companies were joint employers of the Berberich drivers assigned to the delivery of the Post-Dispatch."[2]

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[2] The Court further observed that even a very substantial degree of centralized control would not of itself dictate a finding of joint employment (See Pet. App. A-35).

Thus the Court of Appeals did not "misapprehend" or "grossly misapply" the applicable standard of review, as suggested by petitioner. Rather, the Court properly performed its statutory function of ensuring that the proper legal criteria were applied by the Board. Because the Board had departed from the teachings of this Court concerning the governing test for joint employment, the Eighth Circuit refused to enforce a decision which was thus based upon inappropriate legal criteria. Even assuming, however, that the Court of Appeals retried the facts as found by the Board — an assumption which had no basis in fact — this case would hardly take on the necessary importance to justify a grant of certiorari.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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